No. 17473

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAN EMIL DONATO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

(1962 Appeal)

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(1962 Appeal)

I.

JURISDICTIONAL STATEMENT.

The "Brief of Appellee", in the first appeal (1961) of this case, completely set out the Jurisdiction of the District Court and of this Honorable Court in this action and the Jurisdictional Statement contained therein is respectfully incorporated in this Brief.

The following Briefs were filed in the 1961 appeal:

Appellant's Opening Brief;

Brief of Appellee;

Appellant's Reply Brief;

Appellee's Reply Brief;

Appellant's Reply to Appellee's Reply Brief.

Thereafter, on February 14, 1962, this Court rendered its opinion which concluded as follows:

> ". . . Reversed and remanded with instructions that the judgment be set aside and for further proceedings in accordance with this opinion."
>
> *Donato v. United States,* 302 F. 2d 468 (9th Cir. 1962).

On April 24, 1962, the case was called in the United States District Court for the Southern District of California, before the Honorable William M. Byrne, the same Judge who had presided over the original trial on May 1, 1961. Judge Byrne caused a "Certificate to the Court of Appeals" (hereinafter referred to as Certificate) to be filed and ordered a new and second judgment to be entered finding appellant guilty as charged; and once again appellant was sentenced to the custody of the Attorney General for a period of three years. It was further stated in the Judgment:

> ". . . that in compliance with the direction of the Court of Appeals, in its opinion of February 14, 1962, this judgment is rendered for the purpose of preserving the right of further appellate review.
>
> This judgment is in lieu of, and not in addition to, the judgment rendered by this court on May 22, 1961." [C. T. 13.][1]

Jurisdiction of the District Court was again based on Title 18, United States Code, Section 3231, and Title 50, United States Code, Appendix, Section 462.

Jurisdiction of this Court is again based on Title 28, United States Code, Sections 1291 and 1294.

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[1]C. T. refers to Clerk's Transcript of Record.

II.
STATEMENT OF THE CASE.

In this Court's opinion (*Donato v. United States, supra*), after discussing the contentions of appellant as to whether or not there was basis in fact for the local board's classification of appellant in Class 1-A, attention was directed to the applicability of the "exhaustion of remedies" rule as a bar to appellant's standing to assert the invalidity of his classification as a defense in this case. After reference to appellant's assertion that such rule was not inflexible, this Court recognized it had strictly adhered to the application of the rule in cases:

> ". . . where failure to appeal appeared to be a deliberate and intentional rejection of the administrative review which had been provided. . . ." (p. 470.)

But it was further stated by the Court that:

> ". . . An area does remain however, within which relaxation of the rule can be found to be just and proper. Each case thus presents the question whether the particular circumstances which exist make the case an appropriate one for the relaxation of a strict adherence to the rule." (p. 470.)

Following a brief discussion of the reasons advanced by appellant for his not having proceeded with an administrative appeal, the Court pointed out, at page 470, that:

> ". . . The balancing of the competing considerations which a case presents should take place at the trial level where the true facts may be found and their significance weighed. . . ."

noting further:

> ". . . the record does not disclose that such consideration was given in this case. . . . Under these circumstances, an expression by the district court is essential to informed appellate review. Accordingly, this case must be remanded to the district court for . . . decision upon the question whether, under all of the circumstances of this case, a relaxation of the exhaustion of remedies rule would be just and proper." (P. 470.)

This Court further ordered the District Court to decide the applicability of the rule and to express its opinion accordingly and to enter a new final judgment ". . . preserving rights to further appellate review." (P. 470.)

Judge Byrne responded to the order of this Court and expressed this opinion and conclusion that:

> ". . . This court did consider the testimony and evidence presented by defendant, balanced the competing considerations, and concluded that under all of the circumstances of this case, a relaxation of the exhaustion of remedies rule would not be just and proper. This court has reviewed the records and files of the case, including the reporter's transcript, and presently is of the same opinion." [Certificate, C. T. 11.]

After further discussion of the testimony and evidence in the case, Judge Byrne concluded his Certificate:

> ". . . It is clear that the defendant's failure to appeal administratively was deliberate and intentional". [C. T. 12.]

Appellant has framed the questions before this Court as follows (A. O. B. 1962, 2-3):[2]

"I

"Was there a legal basis for the conclusion of the trial judge at the remand hearing, April 24, 1962, to wit: That the defendant was not to be believed on the issue of defendant's avowed intention to perfect an administrative appeal?"

"II

"Is a selective service system appeal essential, as an exhaustion of administrative remedies in a criminal case?"

and has stated the Specifications of Error as:

"I

"The district court erred in concluding it had a basis in fact for finding appellant lied.

"II

"The district court erred in not considering appellant's defenses on their merits."

The question now before this Court, although framed by appellant in the context of a "sufficiency of the evidence" attack on Judge Byrne's findings, is as stated by this Court in its opinion, to wit:

"Whether the particular circumstances which exist make the case an appropriate one for relaxation of or strict adherence to the rule." (p. 470.)

---

[2]"A. O. B. 1962" refers to Appellant's Opening Brief, 1962 Appeal.

Appellee has not conceded the "basis in fact for classification" issue, but rather views it as being subordinate to the immediate pre-occupying question.

III.
STATEMENT OF FACTS.

Appellant's Opening Brief (1961 Appeal) and the Brief of Appellee (1961 Appeal) together contain a detailed statement of the original factual situation as presented to this Court in 1961. Other than the expression of Judge Byrne, in his Certificate [C. T. 10-12], as to his reconsideration of the records and evidence in the case and his conclusions therefrom, there are no new facts to be presented to this Court in the instant appeal.

IV.
SUMMARY OF ARGUMENT.

Appellee's argument heretofore presented in this case, coupled with the statement of conclusions of the District Judge in his Certificate, adequately support appellee's position that this appellant, under all of the circumstances appertaining to his particular status, has no standing to assert the invalidity of his classification, due to his failure to exhaust his administrative appellate remedies with the Selective Service System; and the judgment of the trial court should be affirmed.

V.
ARGUMENT.

Preliminarily, it is respectfully requested that this argument be viewed as a supplement to that contained in appellee's two prior briefs in the 1961 appeal.

A. There Is Substantial Evidence to Support Judge Byrne's Conclusion That "Under All of the Circumstances of This Case, a Relaxation of the Exhaustion of Administrative Remedies Rule Would Not Be Just and Proper."

Although appellant has framed his attack on Judge Byrne's determination that "under all of the circumstances of this case a relaxation of administrative remedies rule would not be just and proper" [C. T. 11] in phraseology of ". . . lack of legal basis for the conclusion" (A. O. B. 1962, 2) and ". . . the district court erred in concluding it had a basis in fact for finding appellant lied"; such language is confusingly similar to the "basis in fact" attack on appellant's classification by the Local Board. Since such language has "words of art" meaning in Selective Service cases it might be more appropriate to recognize that appellant was contending that there was insufficient evidence, not to support the conviction *per se,* but to support the trial court, sitting as a trier of fact, in its findings as to the credibility of appellant in light of all of the circumstances of the case.

Appellant is asking this court to place itself in the District Judge's position of fact finder despite the com-

ment in the earlier *Donato* opinion, *supra,* at page 470, that:

> ". . . The balancing of the competing considerations which a case presents should take place at the trial level where the true facts may be found and their significance weighed."

Strangely enough appellant points out that:

> ". . . The *only* evidence to support the trial court's conclusion that Donato lied is that he didn't appeal the *first* time" (A. O. B. 6, 1962.) (Emphasis added.)

Although appellant's testimony is clear that he was first classified 1-A on February 19, 1958 and that he was aware of his right to appeal at the time and to request a personal appearance before the Board, and that he *chose* not to exercise those rights at that time [R. T. 31-32],[3] this prior failure to appeal was not even mentioned by Judge Byrne in his Certificate to support his conclusion that:

> ". . . Defendant's failure to appeal administratively (from the *second* classification of July 13, 1960) was deliberate and intentional."

Judge Byrne *did* speak of the following facts to support his determination [C. T. 11-12]:

> (1) "This is not a case where a man was unexpectedly pressed into emergency service to fight fires, thus temporarily upsetting his pattern of life . . .";

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[3]R. T. refers to Reporter's Transcript of Proceedings, 1961 Appeal.

(2) ". . . With full knowledge that he had 10 days from July 13, 1962, to appeal . . .";

(3) ". . . and the further knowledge that his contract of employment with the Forestry Service made him subject to call at any time, the defendant did not file a notice of appeal . . ."

(4) ". . . even when the Forestry Service notified him to get his affairs in shape, two days before the actual call to his employment, he did nothing . . ."

Judge Byrne further stated that: "This court has reviewed the records and files of this case, including the reporter's transcript . . ." and was still of the same opinion as he had been at the trial, that:

". . . under all of the circumstances of this case a relaxation of the exhaustion of administrative remedies rule would not be just and proper." [Certificate, C. T. 11.]

The records and files of this case also disclose the following evidence:

(1) That appellant had received the second notification five days prior to the time he left to fight fires [R. T. 32];

(2) That appellant understood and knew that ". . . a letter will usually suffice for any type of action of this type . . . (re appealing the classification or requesting a personal appearance) to make a request" [R. T. 33];

(3) That despite such knowledge, no effort was made to appeal the classification even after returning from fire fighting, albeit after the 10 day period; or to re-

quest an extension of the period for taking an appeal due to extenuating circumstances;

(4) That appellant claimed his delay in appealing his classification during the interim between receipt of the notice and the time when he left to fight fires, was for the reason that:

> ". . . [he] . . . had gotten further information on appealing this particular instance, and was preparing information to *send* an appeal in . . ." [R. T. 33.] (Emphasis added).

This despite the fact that at a personal appearance before the board on July 13th, the very day the notice was sent out, appellant declined to furnish additional information to the board [R. T. 34-35]; and responded to a cross-examination question during the trial as follows:

> "Q. Did you make any attempt *thereafter* to submit additional information to try to sway the board, or to show the board of your good faith in your desire to be classified as 1-0? A. I thought their questions covered it fully and there was no other necessity." [R. T. 35.] (Emphasis added.)

Thus on July 13th, appellant had no intention to submit additional information to the board; yet now claims the trier of fact had no "basis" for disbelieving testimony that the reasons for his not appealing within the 10 day period was because he was *then* "preparing information to send an appeal in."

It is apparent that appellant was not quite the "inexperienced young man" as characterized in Appellant's

Opening Brief (1962 appeal) at page 15. Judge Byrne had substantial and sufficient "basis" to support his conclusion, notwithstanding the closing comment in Appellant's Opening Brief (1962 appeal) at pages 15 and 16 that:

> ". . . the omission occurred not only without evidence of ill intent but where evidence of good intent is disbelieved *solely* on the basis of testimony, regarding some other and quite distinct act, in itself not casting any doubt on the character of the witness." (Emphasis added.)

In addition to the aforementioned discussion, it must be noted that the trier of fact has the axiomatic right to judge the credibility of a witness in the light of all of the evidence as well as his demeanor while testifying. *Stopelli v. United States,* 183 F. 2d 391 (9 Cir. 1950).

It is respectfully submitted that the evidence, when viewed in the light most favorable to the Government, supports Judge Byrnes' conclusions in his certificate as well as the judgment in this case.

Glasser v. United States, 315 U. S. 60 (1941);

Sandez v. United States, 239 F. 2d 239 (9th Cir. 1956);

Robinson v. United States, 262 F. 2d 645 (9th Cir. 1959);

Young v. United States, 298 F. 2d 108 (9th Cir. 1962).

B. The "Exhaustion of Administrative Remedies Rule" Is Applicable to Selective Service Cases and Should Be Relaxed Only Under Extremely Exceptional and Unusual Cases.

Appellant's argument in favor of discarding established administrative procedures which have been set up by law and regulations, implicitly presupposes three premises:

(1) That the Supreme Court has never declared the exhaustion of remedies rule to be applicable to Selective Service cases (A. O. B. 1962, 7);

(2) That neither Ninth Circuit decisions nor those of the other circuits are compelling authority on this question;

(3) That the only key step in the administrative process which should be considered, if any at all, in testing whether or not a registrant has exhausted his administrative remedies, is the *final step* in the administrative procedures (*i.e.*, refusing to report for induction) and all intermediate steps ". . . are optional. . . . They are like rungs of a ladder and that arriving at the end of the ladder is *the essential step* to 'complete the Selective Service process'." (A. O. B. 1962, 13) (Emphasis added.)

Premise No. (1):

The Supreme Court has, in each of the following cases, ruled on the application of the exhaustion of remedies rule to Selective Service cases:

United States v. Falbo, 320 U. S. 549 (1944);

Estep v. United States, 327 U. S. 114 (1945);

United States v. Balogh, 329 U. S. 692 (1946).

Although appellant now claims that the court in *Falbo, supra,* did not even refer to exhaustion, there is little doubt of what the Court meant when it said:

> "Surely if Congress had intended to authorize interference without that process by intermediate challenges of orders to report, it would have said so. . . ." (*Falbo, supra,* p. 551).

The Court was clearly speaking in terms of the requirement that one must exhaust the administrative steps in the Selective Service System before judicial review of the propriety of the classification would be justified.

And in the very language from *Billings v. Truesdale,* 321 U. S. 540 (1944), cited by appellant (A. O. B. 1962, 8), the Court restated what it meant in *Falbo, supra,* when it said:

> " 'Moreover, it should be remembered that he who reports at the induction station is following the procedure outlined in the Falbo case for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challange the legality of his classification in the courts.' "

and similarly the language from *Estep, supra* (A. O. B. 1962, 11):

> " 'In Falbo v. United States . . . We found no provision for judicial review of a registrant's classification prior to the time when he had taken *all* the steps in the selective service process and had been finally accepted by the armed services. . . .'
>
> " 'In the Falbo case the defendant challenged the order of his local board before he had exhausted his remedies. Here these registrants had preserved their administrative remedies to the end' (327 U. S. at 123)."

For the reasons stated herein as well as those presented in Brief of Appellee (1961), pages 13-17, it is submitted that "Premise No. (1)" must fall.

Premise No. (2):

There is ample consistent authority in this and other circuits for the application of the exhaustion rule to this case, and thus negate "Premise No. (2)". For examples of such cases see:

First Circuit:

Swaczyk v. United States, 156 F. 2d 17, 19 (1st Cir. 1946); *cert. denied* 329 U. S. 726 (1946);

Second Circuit:

Watkins v. Ruppert, 224 F. 2d 47 (2nd Cir. 1955).

Third Circuit:

Palmer v. United States, 223 F. 2d 893 (3rd Cir. 1955).

Fourth Circuit:

United States v. Miller, 143 Fed. Supp. 712 (D. C. W. Va., 1956), *aff'd* 239 F. 2d 148 (4th Cir. 1956).

Seventh Circuit:

United States v. Rumsa, 212 F. 2d 927 (7th Cir. 1954);

United States v. Nichols, 241 F. 2d 1 (7th Cir. 1957).

Eighth Circuit:

Johnson v. United States, 126 F. 2d 242, 247 (8th Cir. 1942);

Glover v. United States, 286 F. 2d 84 (8th Cir. 1961).

Ninth Circuit:

Olinger v. Partridge, 196 F. 2d 986 (9th Cir. 1952);

Williams v. United States, 203 F. 2d 85 (9th Cir. 1953);

Mason v. United States, 218 F. 2d 375 (9th Cir. 1954);

Evans v. United States, 252 F. 2d 509 (9th Cir. 1958);

Moore v. United States, 302 F. 2d 929, 930 (9th Cir. 1962), decided three months after *Donato v. United States,* 302 F. 2d 468 (9th Cir. 1962).

In all of these cases the issue has not been "Is there such a rule," but rather the ultimate question is as framed in *Glover, supra,* which case recognized but did not apply the doctrine to that particular factual situation. The court said at pages 90-91:

> "We adhere to the general rule as to the necessity for exhaustion of administrative remedies in order to obtain a judicial review, and are of the opinion that such rule is generally applicable and usually necessary. However, we are of the view that such general rule is not absolute, inflexible and without exception, *but that it is to be relaxed only under extremely exceptional circumstances.* The factual situation presented in *this* case is appropriate for and requires the relaxation of such rule." (Emphasis added.)

Premise No. (3):

Appellant's contention that ". . . an administrative appeal is but an intermediate 'rung' and otherwise concedely optional . . ." also falls by virtue of this circuit's opinions dealing with registrants' failures to pursue one of the many administrative steps, ranging from appeals of classifications to actual reporting for induction. For examples of particular cases see: *Failure to appeal classification cases:*

Evans v. United States, 252 F. 2d 509 (9th Cir. 1958);

Prohoroff v. United States, 259 F. 2d 694 (9th Cir. 1958).

Failure to report to local board to receive instructions to proceed to a place of employment for civilian work; or failure to report to such place of employment:

Bjorson v. United States, 272 F. 2d 244 (9th Cir. 1959), cert. denied 362 U. S. 949 (1960).

VI.

CONCLUSION.

This court has sought further information from the trial court as to "whether or not under all of the circumstances of this case, a relaxation of the exhaustion of remedies rule would be just and proper" (*Donato v. United States,* 302 U. S. 468 (9th Cir. 1962).) The response has been that it would not.

It is respectfully submitted that appellant's situation does not provide a proper vehicle for other than a strict application of the rule. There was no fault on the part of the Selective Service System and the position in which appellant finds himself is due solely to his own

indifference or willful disregard of established procedures. A contrary ruling in this case would provide a registrant with a method for circumventing proper and orderly administrative procedure and would permit registrants to retain for themsleves the choice of presenting pertinent facts to the courts in the first instance and thereby substantially interfere with the administration of the Universal Military Training and Service Act.

The Judgment of the trial court should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. BRIN SCHULMAN,
Assistant U. S. Attorney.